IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.527 OF 2003

WITH

CIVIL APPLICATION NO.786 OF 2003

Ismail Mahamad Hatwadkar ...Appellant

Versus

Unus Kasam Hatwadkar (since deceased)
through his heirs & legal
representatives:

1A.Hafija Unus Hatwadkar & Ors. ...Respondents

.....

Mr.Arfan A.E.A.Sait for Appellant.

None for Respondents.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 10, 2006.

P.C.

1. Heard Counsel for the Appellant. Perused the relevant documents on record.

2. This Appeal from Order is finally disposed

of in terms of order dated 21st July 2003. The Respondents have been duly served with the notice issued in terms of order dated 21st July 2003. None appears for the Respondents.

3. This Appeal from Order takes exception to the Judgment and Order passed by the District Judge, Ratnagiri dated 3rd May 2003 in Civil Appeal No.102 of 1997. By this order, the First Appellate Court partly allowed the Appeal preferred by the Respondents/Plaintiffs and remanded the matter to the Trial Court restoring the Suit to its original number in the Register of Civil Suits and proceed to determine the Suit by directing the parties to lead evidence in view of the observations made in the impugned Judgement.

4. The reason for which the Suit was remanded by the First Appellate Court can be discerned from Para 18 of the impugned Judgment. It is mentioned that there were two notices and reply, which are relevant documents, have not been proved by the Plaintiffs. Those documents would indicate that the Defendant No.1 had admitted the relationship

and also the fact that the Plaintiffs had share in the suit property. The Court below, therefore, noted that for the fault of the Advocate, the party should not suffer. In other words, with a view to give opportunity to the Plaintiffs to prove the relevant documents, so that, the matter can be considered afresh in the light of those documents, the First Appellate Court thought it appropriate to remand the Suit to the file of the Trial Court. The correctness of this view is challenged in the present Appeal from Order.

5. Counsel for the Appellant has placed reliance on the decision of the Apex Court in the case of **Peria Nachi Muthu Gounder & Ors. vs. Raju Thevar (Dead) & Ors. reported in (1985) 2 SCC 290** to contend that the Appellate Court, on its own, could not have remanded the matter on the reason recorded namely to permit the Plaintiffs to prove the relevant documents, so that, the matter can be considered afresh on the basis of the documents. It is submitted that even in the present case, the Plaintiffs, in the Appeal as filed before the lower Court, did not make any grievance nor offered any

explanation as to in what circumstances the said documents could not be proved in evidence. Besides, no specific ground was taken in the Appeal Memo that the Court may remand the matter to the Trial Court for retrial and reconsideration, which is the order passed by the Appellate Court. This is impermissible, contends learned Counsel for the Appellant.

6. As mentioned earlier, none appears for the Respondents though served. After considering the relevant documents on record, I find substance in the stand taken by the Appellant that it was not open for the First Appellate Court to remand the Suit to the file of the Trial Court for retrial and reconsideration of the matter in the light of decision of the Apex Court pressed into service by the Appellant. Even in the present case, no specific plea for opportunity to lead evidence, if materials were insufficient, was taken in the Appeal Memo. The Appeal remained pending before the First Appellate Court from 1997. No specific ground has been taken to explain the circumstances in which the relevant documents could not be proved

in evidence. In such a case, the Appellate Court should not have assumed that the said documents were not proved because of the mistake of the Advocate so as to take a lenient view of the matter and remand the proceedings in the interest of justice. That course was not open to the First Appellate Court in the fact situation of the present case.

7. In the circumstances, I have no hesitation in accepting the argument canvassed on behalf of the Appellant that the Judgment under Appeal directing remand of the Suit to be tried before the Trial Court by permitting the parties to lead further evidence, will have to be set-aside.

8. As the Appellate Court has not considered the matter on merits and recorded any finding on merits, as I have set-aside the order of remand, the appropriate order that ought to be passed in such a situation is to restore the Appeal to the file of the Appellate Court to be decided on the basis of materials already on record in accordance with law. All questions in that behalf are left

open to be decided by the First Appellate Court. The First Appellate Court shall proceed to finally dispose of the restored Appeal in terms of this order expeditiously, in any case, by end of December 2006.

9. Parties shall appear before the First Appellate Court on 4th September 2006 when the Court may pass suitable orders for the hearing of the Appeal.

10. Accordingly, this Appeal is allowed. Impugned Judgment and Order is set-aside.

11. In view of the above order, Civil Application also stands disposed of.

A.M.KHANWILKAR, J.